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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IDAHO POWER COMPANY,

Complainant,

vs.

GLENN'S FERRY COGENERATION
PARTNERS, LTD., a Colorado limited
partnership,

Respondent.

Case No. IPC-E-08-20

**IDAHO POWER COMPANY'S REPLY
BRIEF IN SUPPORT OF MOTION TO
DISMISS WITHOUT PREJUDICE**

Complainant Idaho Power Company ("Idaho Power"), by and through counsel Donovan E. Walker, of Idaho Power Company, and Bruce C. Jones, of the firm Jones & Swartz PLLC, hereby replies to Respondent Glenn's Ferry Cogeneration Partners, Ltd.'s ("Glenn's Ferry") opposition to Idaho Power's Motion to Dismiss Without Prejudice ("Motion to Dismiss").

INTRODUCTION

Glenns Ferry asserts that Idaho Power's Petition for Declaratory Order and Formal Claim for Breach of Contract (Petition) should be dismissed with prejudice rather than without prejudice as requested by Idaho Power. Glenns Ferry's opposition is without basis, either in fact or law. Glenns Ferry's assertions that Idaho Power has acted in bad faith are both without evidentiary support in the record, and are factually inaccurate.

In addition, it was Glenns Ferry that filed a motion to dismiss the Petition arguing that the Commission lacked subject matter jurisdiction to hear the claims presented therein. It is both by logic and black letter law that if a tribunal lacks subject matter jurisdiction to hear a dispute, it lacks the jurisdiction to adjudicate the subject matter of the litigation on the merits. Thus, the action must be dismissed without prejudice. Even if the Commission were to rule in Glenns Ferry's favor on its Motion to Dismiss, the appropriate remedy would still be to dismiss the Petition without prejudice, the same remedy that Idaho Power seeks in its Motion to Dismiss.

ARGUMENT

Glenns Ferry's recitation of the procedural history of this matter is generally accurate and confirms that Idaho Power has diligently pursued its Petition, including responding to Glenns Ferry's Motion to Dismiss. The Commission heard oral argument on the Motion to Dismiss on March 3, 2009, and the Motion has been fully submitted to the Commission as of that date. Glenns Ferry is also accurate in its assertion that the parties have engaged in settlement discussions since the date of oral argument, and that those settlement negotiations have been unsuccessful.

Idaho Power strongly disagrees with Glenns Ferry's characterization of the settlement negotiations, but declines to engage in tit-for-tat complaint about the unreasonable conduct of Glenns Ferry during the negotiations. First, there is nothing to respond to other than bare assertions,

without any accompanying affidavit or other evidentiary support, that Idaho Power engaged in “bad faith” and “throwing up red herring arguments.” Second, the pejorative and histrionic characterizations of the settlement negotiations set forth in Glenns Ferry’s response serve as a telling illustration of the difficulties of negotiating with Glenns Ferry. Third, Glenns Ferry has not, and cannot, point to any legal authority authorizing sanctions against a party for failure to settle a case, much less the most severe sanction of dismissal with prejudice.

The cases Glenns Ferry cites in its opposition brief discuss dismissal with prejudice as a sanction for egregious failures to comply with specific discovery orders. *Ashby v. Western Council, Lumber Prod. and Indus. Workers*, 117 Idaho 684, 686-87, 791 P.2d 434, 436-37 (1990); *Lee v. Nickerson*, 146 Idaho 5, 9-10, 189 P.3d 467, 471-72 (2008). Even reading the cases at their most expansive, the cases cited are irrelevant to the present dispute because the opposition to the Motion to Dismiss has nothing to do with a discovery dispute between the parties, nor any particular violation of procedural rules.

Glenns Ferry also complains that Idaho Power has waited too long to request the dismissal of its Petition. This claim is also without merit. (Opp’n Br. 4) While a plaintiff does have a duty to prosecute his or her case diligently, *Bartlett v. Peak*, 107 Idaho 284, 285, 688 P.2d 1189, 1190 (1984), the present delay has not resulted from a failure of diligence on Idaho Power’s part. Idaho Power timely responded to Glenns Ferry’s Motion to Dismiss, and the matter has been fully submitted to the Commission since March 3, 2009. Idaho Power cannot be accused of delay where it timely responded to the Motion to Dismiss and no further action could be taken by Idaho Power until the pending motion was decided. Glenns Ferry acknowledges that it “advised Commission Staff of such negotiations.” (Opp’n Br. 2) Glenns Ferry could have informed the Commission Staff at any

time during the last two years that it could not reach a settlement with Idaho Power and requested a ruling on its motion.

Perhaps of greater importance, an additional dispute has arisen between the parties since the date of oral argument. In some fashion, the details of which are still unknown to Idaho Power, there has been a change in ownership in Glenns Ferry. Glenns Ferry acknowledges the change of ownership, but deems it “irrelevant” and a “red herring.” (Opp’n Br. 4) While Glenns Ferry may deem the change of ownership interest irrelevant, the Firm Energy Sales Agreement provides otherwise:

This Agreement and all of the terms and provisions hereof shall be binding upon and inure to the benefit of the respective successors and assigns of the Parties hereto, except that *no transfer of Seller’s rights or obligations under this Agreement by merger or otherwise nor any assignment hereof by Seller shall become effective without the written consent of Idaho Power being first obtained.* Such consent shall not be unreasonably withheld. ...

Firm Energy Sales Agreement Art. XXIV (emphasis added). (The Firm Energy Sales Agreement is attached as Exhibit 1 to Idaho Power’s Petition for Declaratory Order and Formal Complaint for Breach of Contract.)

Article XXIV mandates that any transfer of the Seller’s (Glenn Ferry’s) interest by “merger or otherwise” be approved by Idaho Power in writing in advance of transfer. Not only did Glenns Ferry fail to seek Idaho Power’s written approval of the change of ownership, it has even refused to provide the Purchase and Sale Agreement so that Idaho Power can evaluate whether the sale impacts Glenns Ferry’s obligations under the Firm Energy Sales Agreement. (See May 19, 2011 letter from Randy C. Allphin, Idaho Power Senior Energy Contract Coordinator, to Mr. Chuck Walker of Glenns Ferry, attached as Exhibit A to the accompanying Affidavit of Counsel, confirming Glenns Ferry’s refusal to provide Idaho Power with a copy of the Purchase and Sale Agreement.) Given this

new contractual dispute between the parties, Idaho Power has simply chosen to pursue its remedies in a different forum, and hence filed its Motion to Dismiss.

Finally, even if the Commission were to rule on Glenns Ferry's pending Motion to Dismiss in Glenns Ferry's favor, the Commission would be divested of authority to rule on the merits of Idaho Power's Petition, leaving a dismissal without prejudice as the only appropriate remedy. If, as Glenns Ferry claims, the Commission is without subject matter jurisdiction over this matter, then it is also without power to rule on whether Idaho Power is able to present the matter to a body with proper jurisdiction. *See Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989) ("Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court."). Where the Commission is without jurisdiction, it is improper to make any order in the cause except to dismiss the suit. Dismissal for lack of subject matter jurisdiction is not a decision on the merits. *Costello v. United States*, 365 U.S. 265, 285-86 (1961).

In short, it is Glenns Ferry that is wasting time and money by asking the Commission to rule on either the pending Motion to Dismiss or the merits of Idaho Power's Petition, where dismissal without prejudice is the only appropriate remedy.

DATED this 13th day of September, 2011.

JONES & SWARTZ PLLC

By



BRUCE C. JONES

JOY M. BINGHAM

DONOVAN E. WALKER

IDAHO POWER COMPANY

Counsel for Idaho Power Company

CERTIFICATE OF SERVICE

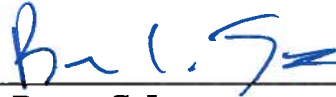
I HEREBY CERTIFY that on this 13th day of September, 2011, a true and correct copy of IDAHO POWER COMPANY'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS WITHOUT PREJUDICE was served upon all parties of record in this proceeding, by the method indicated, addressed as follows:

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